(4-120) (3)

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH AT BILASPUR

Single Bench

SECOND APPEAL NO.५५१ / 2005

Appellant / Plaintiff : Subhash Chandra Agrawal, S/o Ganesh Ram Agrawal, Occupation – Business, R/o Dabhra Road, Kharsia, Tahsil Kharsia, District – Raigarh (CG)

Versus

Respondents / Defendants :

1. Ganeshram Agrawal, S/o Ramkumar Agrawal, Attorney – Meeradevi Agrawal.

2. Smt. Meeradevi Agrawal, W/o Ganeshram Agrawal

(Both R/o Dabhra Road, Kharsia, Tahsil Kharsia, District – Raigarh (CG)

P.R. No. 2496/05
Presented by Shri K.S. Panwar
dated 9/9/05

SECOND APPEAL U/S 100 OF THE CODE OF CIVIL PROCEDURE

(25)

HIGH COURT OF CHHATTISGARH : BILASPUR

Second Appeal No. 441 of 2005

Appellant/ Plaintiff : **Subhash Chandra Agrawal**

Vs.

Respondents/ Defendants : **Ganeshram Agrawal and another.**

Appellant/Plaintiff by Shri Anup Majumdar, Advocate.

ORDER
(Passed on 07/12/05)

Dhirendra Mishra, J

This is the plaintiff's second appeal against the impugned judgment and decree dated 02.08.2005 passed by the learned First Additional District Judge, Raigarh in Civil Appeal No.31-A/2004, whereby the order dated 30.10.2004 passed in Civil Suit No. 183-A/2002 by the Additional Civil Judge, Class-I, Raigarh dismissing the suit of the plaintiff, has been confirmed and the appeal has been dismissed.

2. Brief facts of the case are that the plaintiff filed a civil suit for declaration and perpetual injunction with the averment that he had entered into an agreement with defendant No.1 to purchase the suit shop on 28.05.1998. As per agreement the dimension of the shop was fixed as 11 x 18.09 square feet with a height of 14 feet. It was further agreed that the plaintiff shall temporary occupy shop No.1 without payment of any rent till construction of shop No.4 was over and within one month after the construction, he shall be shifting to shop No.4. The shop was to be constructed by November 1998. However, after completion the plaintiff found that the length of the shop No.4 was 18 feet in place of 18.09 feet as agreed. When this fact was pointed out, the defendants promised to rectify the defect in the year 1999 and after completion of the construction, shall execute a sale deed after obtaining the balance amount of

Rs.1,00,000/-. Thereafter the plaintiff did not comply with the agreement and is insisting that he should occupy the shop in its present condition. A legal notice was sent by the plaintiff to defendant No.1 requesting him to execute a sale deed of the suit shop as agreed but as he did not comply with the terms of the agreement, the above suit was filed.

3. The defendants denied that shop No.4 has not been constructed as per agreement and further submitted that defendant No.1 was ready and wiling to execute the sale deed as per agreement and they had sent a registered notice dt.15.02.1999 to the plaintiff informing him that if he is not obtaining the possession of shop No.4 as agreed, it shall be presumed that he is not following the agreement dated 28.05.1998 and accordingly, the agreement shall be terminated and in that event, the defendant shall be free to transfer shop No.4 to some other person.

4. On the basis of the pleadings of the respective parties, the trial Court framed issues and dismissed the suit holding that shop No. 4 situated over plot No.409/3 and 417/2 was constructed as per agreement and in fact the plaintiff was not willing to comply with the terms and conditions of the agreement and he is not in legal possession of shop No.1 and that the shop in question has been property valued.

5. The appeal preferred by the plaintiff has been also dismissed by the appellate Court and the findings of the trial Court was upheld.

6. Learned counsel for the appellant/plaintiff submits that findings of both the Courts below are based on the report submitted by the Commissioner. However, since the report submitted by the Commissioner does not answer the factual dispute regarding length of the suit shop raised by the plaintiff, the Courts below have committed illegality by relying upon the Commissioner's report and in dismissing the suit of the plaintiff. Learned counsel further argues that shop No. 4 has been constructed by encroaching the Nuzul plot whereupon he moved an application for amending his plaint to incorporate a pleading that a part of shop No. 4 is constructed over Nuzul plot which is in violation of the agreement. However, the same has been rejected on the ground that the plaintiff has

not annexed any document to substantiate his allegations in the amendment application.

7. I have heard learned counsel for the appellant/plaintiff.

8. Both the Courts below on the basis of evidence available on record and further on the basis of report of the Commissioner appointed by the Court, have arrived at the conclusion that shop No. 4 has been constructed as per agreement between the parties and the submission of the plaintiff that there was some oral agreement also regarding the construction, has been disbelieved with a finding that the plaintiff has failed to prove the same by leading oral evidence.

9. The finding of both the Courts below is also based on the fact that when construction of the shop was going on, pipe fittings within the wall was undertaken as per his direction. Both the Courts below after elaborately discussing the evidence available on record have arrived at the conclusion that the plaintiff has failed to prove his case and the same is based on proper appreciation of the evidence.

10. Thus on the basis of aforesaid discussions, I am of the opinion that no substantial question of law is involved for adjudication of this appeal and accordingly, the appeal being devoid of merits deserves to be dismissed and it is dismissed.

Sd/-
Dhirendra Mishra
Judge
07/12/2005

Khan